Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

No. 95-263

In The

Supreme Court of the United States

October Term, 1995

CHESHIRE MEDICAL CENTER,

Petitioner,

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' ("Grace") counter-statement of the case raises under the guise of established "fact" the same arguments the District Court rejected when it admitted legal error (A31-32 (853 F.Supp. at 568))[1] and the same arguments the First Circuit rejected when it assumed that this admission of error was correct. A5 (49 F.3d at 29). Grace's opposition further mischaracterizes the First Circuit's decision and the questions presented, and offers no persuasive reason why the Petition should not be granted.

I. THE "FACTS" GRACE SAYS ARE ESTABLISHED ARE ARGUMENTS THE DISTRICT COURT AND FIRST CIRCUIT REJECTED.

Grace raised the same "facts" it tells this Court are established – that the omitted strict liability charge was not error and was unsupported by the evidence (Grace Opp. 2-5) – in opposition to Cheshire's motion for a new trial. Reply App. 1-7 (Excerpts from Grace Memorandum, Docket 210). The District Court disagreed:

> . . . *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction in this case was

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[1] The appendix to the Petition is cited as "A ___," the appendix to this Reply as "Reply App. ___," the Petition as "Petition ___," and Grace's Brief in Opposition as "Grace Opp. ___."

> indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights.
>
> A31-32 (853 F.Supp. at 568).

Grace again raised these same "facts" on appeal. Reply App. 8-15 (Excerpts from Grace Appellee Brief). The First Circuit assumed that the District Court correctly admitted its legal error. A5 (49 F.3d at 29).

II. GRACE MISCHARACTERIZES THE FIRST CIRCUIT'S DECISION.

Grace also mistakenly says that the First Circuit held that the admitted error was preserved and harmless (Grace Opp. 8-9, 15), and effectively performed a plain error review on this issue. Grace Opp. at 14. The face of the decisions show otherwise.

After noting that Massachusetts warranty law is "coextensive" with strict liability law (A32-33 n. 2 (853 F.Supp. 568-69)), the District Court relied heavily on *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990) (Mass. law), *aff'd on remand*, 981 F.2d 7 (1st Cir. 1992), to conclude that the legal error it admittedly made was harmless because the "no negligence" finding precluded a strict liability finding based on inadequate warnings. A32-36 (853 F.Supp. at 568-569). Cheshire pointed out on appeal (A55 n. 2) that *Kotler* actually shows that the admitted error was reversible error because the jury could have found that inadequate warnings rendered Grace strictly liable despite Grace's lack of negligence:

> Lest we oversimplify, we add that, although the formulation of the duty to warn is similar in both negligence and warranty, the inquiry into the breach of the duty can be quite dissimilar. For example, where an attempt has been made to warn of a particular hazard, the jury could conceivably conclude "that, although the manufacturer was not unreasonable and hence not negligent in the warning provided, the warnings were still insufficient to render the product suitable for its foreseeable uses." *Allen*, 873 F.2d at 466 n. 2. [*Allen v. Chance Mfg's Co.*, 873 F.2d 465 (1st Cir. 1989) (Mass. law)]. . . .
>
> When the adequacy of provided warnings are at issue, there is room to find breach of warranty even in the absence of negligence.
>
> *Kotler*, 926 F.2d at 1230-31 and n. 14.

In this case, the First Circuit began its opinion by noting that it was "precluded" from reaching this issue (A2 (49 F.3d at 28)), and later held that Cheshire's objection was not specific enough to preserve the issue, numbering this holding as its conclusion number "2." A22-23 (49 F.3d at 35-36).

Unlike its review of the omitted asbestos exposure level charge (A9-10 (49 F.3d at 30-31)), the First Circuit did not purport to review this issue for plain error, and totally disregarded the District Court's conclusion that Cheshire "properly preserved" its strict liability request to charge and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

III. GRACE MISCHARACTERIZES THE QUESTIONS PRESENTED.

Grace argues that the law is well settled on the standards governing substantive review of an instruction's content (Grace Opp. 6-8), on an appellate court's ability to affirm on any ground in the record (Grace Opp. 8-9), and on the standards governing whether an instruction is plain error. Grace Opp. 10-12. The Petition does not implicate these issues.

Question 1 asks this Court to decide if a district court's explicit decision that an instructional objection "properly preserved" the error is entitled to deference in determining whether or not the objection is specific enough to require substantive review in the first place. Petition i. This asks if an appellate court can ignore the record, not if the court can base its decision on other grounds found in the record.

If this Court determines that appellate courts do indeed owe the same deference to a district court's specificity finding that this Court showed in *Hicks v. United States*, 150 U.S. 442, 453 (1893), the First Circuit on remand will, of course, apply the standards Grace cites for reviewing instructions on their merits – *de novo* review of state law to determine if the instructions as a whole tended to confuse or mislead the jury. Grace Opp. 6-7.

Assuming *arguendo*, however, that no deference is due (it is) and the admitted instructional error was not preserved (it was), Question 2 asks this Court to decide what, if any, limits exist on the discretion to review unpreserved instructional error in civil appeals (and if

this discretion even exists). Petition i. This asks if and when appellate courts should review for plain error, not what standards to apply once the court decides to do so.

If this Court resolves the circuit split by holding that plain error review is available and that the discretion to refuse this review is governed by *United States v. Olano*, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the First Circuit on remand will apply the plain error standards Grace emphasizes. Grace Opp. 10-12.

IV. GRACE'S CHALLENGES TO QUESTION 1 ARE UNPERSUASIVE.

Grace mistakenly says Cheshire's logic leaves "no role for a court of appeals under Rule 51." Grace Opp. 7. To the contrary, Question 1 only involves deference to a decision on an instructional objection's specificity, not its proper timing, and, like the deference granted in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), this specificity decision will still be subject to review for legal error. *Id.* at 402.

The cold record Grace further emphasizes (Grace Opp. 7 n. 9) ignores that the undisputed purpose of the specificity requirement is to give district courts an opportunity to correct legal error before jury deliberations. Petition at 8-9. Like the fact-dependent standard at issue in *Cooter*, it is the district court who is in the best, if not only, position to tell if the objection was indeed specific enough to give it this opportunity. *Cooter*, 496 U.S. at 402.

Hicks dispels Grace's further confusion about deference to decisions on an objection's specificity with decisions on an objection's merits. Grace Opp. 7 n. 10. As Grace notes (Grace Opp. 7 n. 9), this Court reversed on the merits after the Court deferred to the trial court's decision that the exception to the instructions was specifically enough to preserve the issues. *Hicks*, 150 U.S. at 453. Cheshire anticipates that the First Circuit will also reverse on the merits once it, like this Court in *Hicks*, defers to the District Court's conclusion that the instructional error it admittedly made was "properly preserved." A32 (853 F.Supp. at 568).

V. GRACE'S CHALLENGES TO QUESTION 2 ARE UNPERSUASIVE.

Grace misses the point when it suggests that Cheshire should be grateful that it litigated in a forum that afforded any plain error review (Grace Opp. 10 n. 12) and when Grace argues that Courts of Appeals are necessarily allowed a wide measure of discretion in the supervision of litigation (Grace Opp. at 12-13). Question 2 asks this Court to decide if there are any limits to the discretion a federal Court of Appeals says it has to review instructions for plain error in civil appeals[2] and if the limits

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[2] Contrary to Grace's further misapprehension (Grace Opp. 13-14 and nn. 13-14), Cheshire does not challenge the First Circuit's plain error determination. Cheshire's point is that the First Circuit arbitrarily reviewed one instruction for plain error without reviewing for plain error the error the District Court admittedly made and held was properly preserved. Petition 11, 14.

Olano placed on this discretion in criminal cases apply to civil appeals. Petition 14-17.

Even Grace notes that *Olano* held that plain error review "should be employed 'in those circumstances in which a miscarriage of justice would otherwise result.' " Grace Opp. 12, *citing Olano,* 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21. In this case, the instructional error the First Circuit inexplicably declined to review for plain error – the error the District Court admittedly made and held was "properly preserved" A31-32 (853 F.Supp. at 568) – resulted in at least as much a "miscarriage of justice" as the other instruction the First Circuit did review for plain error. A9-10 (49 F.3d at 30-31). It is, for example, undisputed that other Courts of Appeals that have applied this "miscarriage of justice" standard in diversity-based product liability actions have reversed defense verdicts based on instructional errors similar to the one the District Court admittedly made here. Petition 15-16.

To reach this question, however, this Court must first resolve the circuit split on whether the appellate courts have any discretion to review for plain error in civil appeals before it can decide if any limits exist on that discretion.

Should this Court decide that the majority of the Courts of Appeals correctly hold that plain error review does apply, and further decide that this review cannot be arbitrarily denied or is governed by *Olano,* Cheshire anticipates that the First Circuit will find that the admitted instructional error is plain error.

CONCLUSION

The Petition should be granted and the case remanded with directions that the First Circuit review its lack of specificity holding with deference to the District Court's conclusion that the issue was "properly preserved," or to at least perform the same plain error review of the admittedly erroneous instruction that the First Circuit performed on another instruction.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Cheshire Medical Center, Plaintiff. v. W.R. Grace & Co. and W.R. Grace & Co.-Conn., Defendants.	Civil Action No. C-88-516-M

W.R. GRACE'S OPPOSITION TO PLAINTIFF'S MOTION FOR A NEW TRIAL

The defendants, W.R. Grace & Co. and W.R. Grace & Co.-Conn. (collectively, "W.R. Grace"), respectfully submit this memorandum in support of their objection to the plaintiff, the Cheshire Medical Center's ("CMC"), Motion For A New Trial.

Plaintiff's motion follows a defense verdict rendered after a long, carefully and fairly tried case, during which plaintiff was permitted to call each and every witness – either live or by deposition testimony – and to introduce numerous documents (often without prior notice to and over the objection of W.R. Grace) which it contended supported its claims. Indeed, a fair reading of the record shows that the plaintiff was given multiple opportunities to make every factual point it wished the jury to consider, including points which were only marginally relevant. Further, the plaintiff was repeatedly allowed to renew objections

* * *

[p. 11] neither expressly nor by implication impose liability and the plaintiff has cited no authority for the proposition that they do. An instruction that they did establish liability would clearly have been unsupported by law and therefore erroneous.[5]

B. The Court's Charge On The Issue Of Strict Product Liability And "Duty To Warn" Was Proper.

Plaintiff contends that the Court's refusal to instruct the jury on "duty to warn" as it applied to plaintiff's strict liability claim against W.R. Grace is reversible error. Plaintiff's argument fails because the instruction given by the Court accurately stated the applicable law and, in any event, either directly or in substance gave the instruction sought by the plaintiff.

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[5] Again, this "liability versus damages" issue was argued at length prior to closing arguments. Any claim that the plaintiff was prejudiced by the Court's failure to give an instruction that the New Hampshire regulations establish liability is without foundation; the plaintiff had clear advance notice that such an instruction would *not* be given. Further, the Court did *not* indicate, as the plaintiff contends (Plaintiff's Memorandum at 2), when it took judicial notice of the statute that the jury would be instructed that the New Hampshire regulations imposed liability. *See* Tr. Oct. 19, 1993 a.m. at 60-61. *See, e.g., Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591 (7th Cir. 1985) (trial court's failure to give instruction on specific provision of state statute was harmless error where court gave a number of other correct instructions on same issue).

1. The Jury Considered The "Duty To Warn" Issue And Rejected It.

As the plaintiff notes, the Court did instruct the jury as to each of the elements of a "duty of warn," albeit in the context of [p. 12] instructions on the negligence claim.[6] The jury's verdict for W.R. Grace on the negligence count necessarily included a finding that either W.R. Grace did not have a duty to warn or W.R. Grace had met any duty that existed. Had the jury been given a similar "duty to warn" instruction in the context of the strict liability claim, it would undoubtedly have made the same finding, and that finding would have been consistent with the jury's general verdict for W.R. Grace on the strict liability count. Accordingly, any purported failure to instruct on a "duty to warn" with regard to the strict liability claim was, at most, harmless error. *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1229 (1st Cir. 1990), *cert. granted and judgment vacated*, 112 S.Ct. 3019 (1992), *aff'd on*

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[6] The instruction given by the Court was as follows:

In determining whether or not the defendant was negligent you must consider whether the defendant breached any duties owed to the plaintiff.

1. **Duty to Warn**

If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. The defendant had a continuing duty to warn the plaintiff of dangers associated with the fireproofing even after the sale of the fireproofing to the plaintiff if the defendant discovered after the sale that the product was defective or dangerous.

July Instructions at 16.

remand, 981 F.2d 7 ("[I]f the instructions that the jury should have received on breach of warranty were materially equivalent to, [p. 13] or subsumed by, the instructions actually received on negligence, then the failure to submit the warranty count to the jury was rendered harmless by the verdict on the negligence count").

In any event, the Court *did* instruct the jury generally and in substance on the "duty to warn" even in the context of the plaintiff's strict liability claim. The Court specifically instructed the jury that in determining whether W.R. Grace was strictly liable under a products liability theory, it should consider all of the acts or omissions of W.R. Grace, including any alleged failures to "lessen or eliminate the danger of even a useful and desirable product."[7] Such an instruction invited the jury to consider whether W.R. Grace had taken steps, including issuing a warning regarding its product, to eliminate any dangers the product posed.

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[7] The Court instructed the jury as follows:

> In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; *liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lesson or eliminate the danger of even a useful and desirable product.*

July Instructions at 19-20 (emphasis added).

[p. 14] 2. The Necessity Of An Explicit "Duty To Warn" Instruction In The Context Of The Plaintiff's Strict Liability Claim Was Unsupported By The Evidence.

The testimony and documentary evidence demonstrated that W.R. Grace, in its 1971 Sweets Catalog brochure and through the efforts of Mr. Egan, issued an advisory to the public regarding the asbestos content of its product and invited purchasers to contact W.R. Grace to obtain further information. *See, e.g.*, Defendants' Ex. 268; Testimony of Thomas Feit, Tr. Oct. 20, 1993 p.m. at 59-66; Testimony of Thomas Egan, Tr. Oct. 27, 1993 a.m. at 104-107, Tr. Oct. 28, 1993 a.m. at 84-85. This evidence supported the conclusion that W.R. Grace did, in fact, warn purchasers of any potential dangers in its product. As such, the product could not have been defective *per se*. Because the plaintiff was unable to rebut this evidence that W.R. Grace had issued a warning, or that the warning as issued was adequate, there was no evidence that W.R. Grace failed to meet any duty to warn.

Further, the plaintiff presented *no* evidence that it, or anyone on its behalf, relied upon information printed on the bags of Monokote at the time of purchase or installation.[8] The jury had no evidentiary basis to find that a

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[8] The plaintiff also took pains to argue that its architect and contractors – the entities which ordered, received and used the product – were *not* its agents for any purpose. Since the plaintiff consistently argued that it could not be bound by *notice* to its architect and contractors, it cannot take advantage of a *lack* of notice to them.

notice on the Monokote bag would have made any difference to anyone. Thus, the instruction [p. 15] now sought by the plaintiff was correctly denied. *Cabassa v. American Union Transport, Inc.*, 58 F.R.D. at 205 ("refusal to give proffered instructions not supported by the evidence is not error").

C. The "Duty To Warn" Instruction Followed Applicable Law.

The plaintiff next contends that the "duty to warn" instruction given by the Court was deficient in that it failed to instruct the jury that W.R. Grace was charged with a duty to warn potential purchasers if it knew or should have known that the asbestos-containing fireproofing *"might"* be dangerous. Plaintiff's Memorandum at 8.[9] Plaintiff thus argues that the Court should have instructed the jury to engage in pure speculation. The plaintiff goes on to assert that the Court should have removed the issue of W.R. Grace's duty to warn from the jury entirely and decided it in plaintiff's favor as a matter of law. Plaintiff's Memorandum at 8 ("The jury should have been instructed that reasonable care demanded that Grace warn about the product's possible dangers.")

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[9] It should be noted that the Court did not indicate to counsel that it would give an instruction that included the conditional language now sought by the plaintiff. Indeed, no "duty to warn" instruction was included at all in the Court's draft jury instructions (attached to the Plaintiff's Memorandum at Tab A). Plaintiff has not pointed to any other instance in which such an inclination was expressed by the Court.

Plaintiff's arguments are unsupported by New Hampshire law and the evidence presented in this case. In *Thibault v. Sears,*

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1687

THE CHESHIRE MEDICAL CENTER,

Plaintiff-Appellant,

v.

W. R. GRACE & CO. and W. R. GRACE & CO.-CONN,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

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* * *

[p. 29] exposure levels ignores the fact that Cheshire disavowed any concern for non-occupational exposure at trial, the court instructed the jury on both federal and state laws relating to *occupational* exposure levels, and the court ruled, without objection from Cheshire, that federal and state laws establishing air quality standards could only be used to compute damages if liability were found and not to establish liability in the first instance. *See* App. 977-998 (counsel's objections to the charge). Because the jury resolved the issue of liability in Grace's favor on all three counts, it did not reach the issue of damages and Cheshire was not prejudiced by any omission of a specific instruction on the New Hampshire non-occupational exposure standard.

II. The Court Properly Instructed The Jury On Strict Products Liability And Its Omission Of A Separate "Duty to Warn" Charge Was At Best Harmless Error

A. An Explicit "Duty to Warn" Instruction In the Context of Cheshire's Strict Liability Claim Was Unsupported by the Evidence

Cheshire contends that the trial court's omission of a separate "duty to warn" instruction in the context of its strict liability claim against Grace is reversible error. This argument fails because the instruction given by the court

accurately stated the applicable law and was fully consistent with the evidence presented by Cheshire on this issue.

After a full month of trial during which Cheshire was given multiple opportunities to make every factual point it wished the [p. 30] jury to consider, and after several hours of deliberation, the jury concluded that MK-3 was not unreasonably dangerous when marketed in 1971 and does not need to be removed from Cheshire's building today. This determination is fully supported by the evidence presented by both Cheshire and Grace.

Cheshire's own evidence – including numerous tests of the concentration of asbestos fibers in the hospital air and personal monitoring of maintenance workers while engaged in activities involving exposure to the fireproofing – indicated that any airborne asbestos exposures were well below the action levels established by federal and state law (App. 1013-1023; App. 254-255, 305-306; Tr. Oct. 15, 1993 p.m. at 64-65). This evidence alone conclusively proved that the fireproofing did not pose an unreasonable danger to either building occupants or maintenance personnel and that Cheshire had indeed suffered no injury. *See generally Bellotte v. Zayre*, 531 F.2d 1100, 1103 (1st Cir. 1976) (evidence that burning characteristics of pajama top complied with federal Flammable Fabrics Act sustained finding that pajamas were not unreasonably dangerous as a matter of New Hampshire law). There was, in short, nothing for Grace to warn about.

Furthermore, Cheshire presented *no* evidence that it, or anyone on its behalf, ever saw or relied on any printed information relating to MK-3. In fact, Cheshire took great

pains to argue that its architect and contractors – the entities which specified, ordered, received and used the product – were *not* its [p. 31] agents for any purpose.[15] Thus, the jury had no evidentiary basis to find that any notice, on the Monokote bag or elsewhere, would have made any difference to anyone, and the instruction sought by Cheshire that Grace had a "duty to warn" in order to make the product less dangerous, was correctly denied. *Cabassa v. American Union Transport, Inc.*, 58 F.R.D. 200, 205 (D.P.R. 1972) ("refusal to give proffered instructions not supported by the evidence is not error").

Finally, Grace did timely disclose to the public the very thing Cheshire complains it should have "warned" about, *i.e.*, the presence of asbestos in its MK-3 product. The testimony and documentary evidence demonstrated that Grace, in its 1971 Sweets Catalog Brochure and through the efforts of Mr. Egan, issued repeated statements to the public regarding the asbestos content of its product and invited purchasers to contact Grace to obtain further information. *See, e.g.*, Ap. 1310-1316; App. 457-464, 660-663, 739-740; Def. Exs. 548, 549; Tr. Oct. 26, 1993 a.m. at 128-130. This evidence supported the conclusion that Grace did, in fact, inform purchasers about the content of its product. As such, the product could not have been defective *per se* due to an alleged lack of a warning disclosing the product's contents. [p. 32] Because

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[15] Since Cheshire consistently argued that it could not be bound by *notice* to its architect and contractors, it should not now be permitted to take advantage of a *lack* of notice to them. *See* Memorandum of Law in Support of Plaintiff's Position that Knowledge of the Architect is not Imputable to Cheshire in This Case (App. 2017).

Cheshire was unable to rebut this evidence that Grace had issued such a disclosure, or that the disclosure as issued was adequate, there was no evidence that Grace failed to meet any "duty to warn."

B. The Court Correctly Charged the Jury On Strict Liability "Duty To Warn"

Even if Cheshire could have established that Grace had a "duty to warn" of a hazard in Monokote, that such a warning would have been seen by Cheshire or anyone on its behalf, and that the "duty to warn" in strict products liability is somehow different from that in negligence, Cheshire still would not have prevailed on its strict liability claim for the simple reason that it failed to establish that it had sustained any injury.

In a products liability claim based on defective design, the burden is on the plaintiff to prove that: (i) the design of the product created a defective condition that was unreasonably dangerous to the user, (ii) the condition existed at the time the product was sold, (iii) the use of the product was reasonably foreseeable by the manufacturer, and (iv) the condition of the product caused injury to either the user or the user's property. *See Chellman v. Saab-Scania AB*, 138 N.H. 73, 77, 637 A.2d 148, 150 (1993) (adopting Restatement (Second) of Torts § 402-A (1965)). The presence and efficacy of a warning is only *one* consideration pertaining to only *one* element of this cause of action. *See Chellman*, 138 N.H. at 77, 637 A.2d at 150 (" 'failure to warn' [p. 33] focuses on the first element of strict products liability: whether a design defect caused the product to be unreasonably dangerous. Whether a

product is unreasonably dangerous also requires the consideration of its social utility balanced against the risk of danger, the cost and practicality of reducing the risk of danger, and the presence or absence and efficacy of a warning of hidden danger.") This is, in substance, the charge that Cheshire sought and that the court gave.[16]

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[16] The court instructed the jury as follows:

> In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lesson or eliminate the danger of even a useful and desirable product.

July Instructions at 19 (App. 1767).

Cheshire proposed a nearly identical instruction:

> *DESIGN DEFECT AND SOCIAL UTILITY:* In determining whether the defendant's product was defectively designed and "not reasonably safe" for its intended use in buildings, you should consider whether safer substitute products were available or could have been developed, and you should then weigh the social utility or desirability of the product against the dangers inherent in its use. Utility or usefulness of a product must be evaluated from the point of view of the public as a whole. In weighing utility and desirability against danger, you should consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing costs. Thus, even if the product is socially useful and desirable, a manufacturer such as the defendant will still be held liable if it

[p. 34] It is significant that in both its proposed jury instructions and its response to the court's draft instructions, Cheshire did not request that the court instruct the jury separately on "duty to warn" in strict products liability. *See* Plaintiff's Proposed Jury Instructions Nos. 29-34 (App. 1878-1884); Plaintiff's Response to Court's Draft Jury Instructions (App. 2011).

Nevertheless, the court *did* instruct the jury in substance on the "duty to warn." The court specifically instructed the jury that in determining whether Grace was strictly liable under a products liability theory, it should consider all of the acts or omissions of Grace, including its alleged failures to "lessen or eliminate the danger of even a useful and desirable product." Such an instruction invited the jury to consider whether Grace had taken steps, including issuing a warning regarding its product, to eliminate any dangers the product posed. Additionally, the court specifically instructed the jury on the identical duty to warn in connection with its negligence claim. *See* § III at pp. 39-41, *infra*. Thus, the jury was fully and correctly instructed on strict products liability law when it found from the evidence that MK-3 was not a defective product.

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did not take steps which were available to lessen or eliminate a known or foreseeable danger.

Plaintiff's Proposed Jury Instructions No. 33 (App. 1883).